IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 7TH JUNE 2007 / 17TH JYAISHTA 1929

WP(C).No. 26430 of 2006(U)

CMA.20/2005 of SUB COURT,NEYYATTINKARA
OS.526/2003 of PRL.M.C.,NEYYATTINKARA

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PETITIONER:

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1. GOPALAN VIJAYAN,
   THALACHANVILA, KUNNUVILA VEEDU,
   PARASSALA VILLAGE.

2. RASEENA, W/O. VIJAYAN,
   THALACHANVILA, KUNNUVILA VEEDU,
   PARASSALA VILLAGE.

3. SHAJI, S/O. VIJAYAN,
   THALACHANVILA, KUNNUVILA VEEDU,
   PARASSALA VILLAGE.

4. JOSE, S/O. VIJAYAN,
   THALACHANVILA, KUNNUVILA VEEDU,
   PARASSALA VILLAGE.

BY ADV. SRI.BLAZE K.JOSE

RESPONDENTS:

DEVASAHAYAM CHELLAYYAN,
SAHAYAVILASOM VEEDU, PARASSALA VILLAGE,
NEYYATTINKARA.

BY ADV. SRI.L.MOHANAN
SRI.M.V.KIRAN MOHAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXTS:

EXT.P1: A TRUE COPY OF THE DECREE DT.29.9.2003 IN O.S.526/03 OF THE PRINCIPAL MUNSIFF COURT, NEYYATTINKARA

EXT.P2: -DO- OF THE ORDER IN I.A.NO: 1435/05 IN O.S.526/03 DT.7.6.2005 OF THE PRINCIPAL MUNSIFF'S COURT, NEYYATTINKARA

EXT.P3: -DO- OF THE JUDGMETN IN C.M.A.20/05 DT.26.8.2006 OF THE SUB JDGE, NEYYATTINKARA

jj /TRUE COPY/

P.S.TO JUDGE

M.N.KRISHNAN, J.

WP(C)No.26430 OF 2006 U

Dated this the 7th June, 2007.

JUDGMENT

This writ petition is filed to quash Exts.P1 and P2 and the order in C.M.A.20/05 of the Subordinate Judge's Court, Neyyattinkara and for a direction to keep E.P.138/04 in abeyance till the disposal of the writ petition. The impugned orders are:

2. A petition to condone the delay of more than 1 1/2 years in filing the application for setting aside the ex parte decree and secondly another petition to set aside the ex parte decree.

3. It is averred in the petition that the first defendant engaged an Advocate on behalf of defendants 2 to 4 and himself and as he did not appear there was an ex parte decree. On the other hand, the respondents would contend that the present petitioners are totally aware of the entire proceedings and they were taking law into their own hands and the respondent has to approach the court for redressal of the grievance. I am conscious of the fact that generally matters regarding setting aside ex parte decrees has to be construed liberally if it satisfy the conscience of the court that there is no gross negligence or grave misconduct. So, what I am attempting to arrive at

is whether these ingredients are absent in this case so as to allow these applications. A counter affidavit filed by the respondents would show that the present petitioners are not new to the field of litigation. They instituted a suit, O.S.801/98 which was dismissed and again it is averred that at their instance another case was filed as O.S.596/00 which was also dismissed. There was a case registered by the police between the parties. Learned counsel for the respondent would submit that taking law into their own hands the present petitioners demolished portion of the wall and therefore he was constrained to file a suit, O.S.526/03. Though a counsel entered appearance, ultimately the matter was set ex parte on 26.3.2003 and a decree was passed. Thereafter, the decree holder moved the executing court as E.P.138/04 and in that case a copy of which is made available, the sixth defendant filed an affidavit and submitted that she is furnishing the affidavit on behalf of herself and other defendants viz., 1,2,4,5 and 7. That affidavit was filed for an order to stay the execution proceedings of the decree and it was filed as early as on 20.11.2004. So the contention of the present writ petitioners that they did not have any idea about the decree just prior to the application filed for setting aside the ex parte decree, cannot be believed at all. The application for setting aside the ex parte decree

has been filed only in 2005 when they were aware of the fact at least in November 2004. If what is averred in the counter affidavit of the respondent is correct the parties were litigating and litigating throughout with reference to the strip of land which is claimed as a way. There were proceedings pending before the Revenue Divisional Officer, where also these persons have participated. Even a just ordinary reasonable man would certainly think about what has happened to the litigation which has been filed against them in the year 2003. Now the pretension of the writ petitioners that they were kept totally in the dark cannot be believed at all. When a litigant entrusts a lawyer or approaches a court there is a duty cast upon him to find out what has happened to the litigation. One cannot expect the lawyer or the court to go to him and inform him about the developments of his case. So this is a classical case, which I feel, where the defendant had deliberately not approached the court to set aside the ex parte decree in spite of an execution application being filed in the year 2004.

4. Learned counsel for the writ petitioners has cited before me the decision of the Apex Court reported in **G.P.Srivastava v. R.K.Raizada** {(2000) 3 SCC 54}. The Apex Court has held that ordinarily a liberal approach should be granted and should not be decided on technicalities. The

headnote of the decision itself would reveal that the word 'sufficient cause' can be interpreted in favour when the party has approached the court for setting aside the ex parte decree within statutory period and that non-appearance is not malafide or intentional. In this context, I may refer to the previous history where the present writ petitioners themselves or through somebody has approached the court for getting a path way for the party which ended in dismissal and therefore the present plaintiff moved the case for restoration of the wall and for getting damages for the act done by themselves. So, the conduct of the defendant is self-explanatory and it is not as innocent as the learned counsel wants this court to believe. I am satisfied that this is a case where the party is guilty of gross negligence and grievous misconduct and therefore the discretionary relief of setting aside the ex parte decree cannot be granted and there is no sufficient cause for either condoning the delay or for setting aside the ex parte decree. Therefore, the writ petition lacks merit and it is dismissed.

M.N.KRISHNAN
Judge

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